

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JODIE L. BRIBIESCA
Claimant

VS.

KANSAS GAS SERVICE
Self-Insured Respondent

)
)
)
)
)
)
)

Docket Nos. 1,012,597;
1,012,598; & 1,037,657¹

ORDER

Respondent appealed the January 28, 2008, Preliminary Hearing Order & Post Award Medical Order entered by Administrative Law Judge John D. Clark. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Larry G. Karns of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The transcript and attached exhibits from the December 20, 2007, Post Award and Preliminary Hearing and the transcript and attached exhibits from the January 16, 2008, deposition of Dr. Robert Eyster comprise the record for this appeal.

¹ The application for post-award medical benefits was filed in both Docket Nos. 1,012,597 and 1,012,598. All three docket numbers should be included as all three were included in the notices of hearing. At the December 20, 2007, hearing, the Judge inadvertently failed to include Docket No. 1,012,598 as the second claim in the post-award application.

ISSUES

This proceeding involves three docketed claims. In Docket No. 1,012, 597, claimant alleged injuries to her upper back, neck and right upper extremity as the result of an accident occurring in mid-September 2002 and each and every working day thereafter. In Docket No. 1,012,598, claimant alleged injury to her low back as the result of an accident occurring on approximately September 5, 2002, and each and every working day thereafter. And finally, in Docket No. 1,037,657, claimant alleged injury to her low back with referred pain as the result of an August 10, 2007, accident.

Claimant requested both temporary total disability benefits and medical treatment for her back. On August 10, 2007, claimant bent over to pick up her keys after arriving at work and experienced increased back pain. The issue presented to Judge Clark was whether claimant's present need of medical treatment is the natural and direct consequence of her September 2002 accident at work or whether, instead, the August 10, 2007, incident constitutes a new and distinct accident that is compensable under the Workers Compensation Act.

In the January 28, 2008, Order, Judge Clark found claimant's present problems were the natural result of her September 2002 accident.

Respondent contends Judge Clark erred. Respondent argues claimant's present back complaints are not the natural consequence of her September 2002 accident and resulting back injury. Instead, respondent argues the August 10, 2007, incident comprises a new and distinct accident and an intervening event. Nevertheless, respondent argues the August 10, 2007, accident is not compensable under the Workers Compensation Act as bending over is an activity of everyday living. Accordingly, respondent argues claimant should not receive any additional benefits in any of these claims.

Conversely, claimant requests the Board to affirm the January 28, 2008, Order. Claimant argues she now needs medical treatment as a direct consequence of her September 2002 back injury. She emphasizes her back problems did not resolve following her September 2002 accident and that the August 2007 incident would not have occurred "but for" her September 2002 low back injury. Accordingly, claimant contends her compensation should be ordered in the claim for the September 2002 accident.

In summary, the first issue now before the Board is whether claimant's present need for medical treatment is the natural consequence of her September 2002 accident or whether her present need for medical treatment is due to a new and distinct accident. And in the event the Board finds the latter, the second issue is whether claimant's August 10,

2007, accident arose out of and in the course of employment with respondent or whether she injured her back by an activity of day-to-day living.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds as follows:

Claimant initially injured her low back in September 2002 while working for respondent. Although the parties previously entered into a settlement agreement in that claim in May 2005, claimant retained the right to seek additional medical treatment and other future benefits.

The December 2007 hearing was a consolidated hearing which combined the post-award application for additional medical benefits in Docket Nos. 1,012,597 and 1,012,598 and a preliminary hearing in Docket No. 1,037,657. Claimant testified that after her May 2005 settlement hearing she continued to experience “slight continuous” low back pain from the September 2002 accident. Claimant explained how some activities such as vacuuming or gardening would sometimes aggravate her back.

Claimant also testified that on August 10, 2007, her low back condition changed for the worse. On that day claimant felt a pulling sensation in her low back when she bent over to pick up keys that she dropped while getting out of her car to go into work. Since that time claimant has experienced extreme pain in her low back and right leg, and numbness in her foot. She also believes she now has more problems in her upper back, which she also injured in September 2002. Claimant states her present low back pain is in the same location as the pain she experienced following her September 2002 injury.

The next week claimant reported the August 2007 incident to respondent, who referred her to Dr. Robert Eyster for medical treatment. Dr. Eyster, who was one of several physicians who treated claimant following her September 2002 injury, injected her low back and recommended an MRI. At that point, however, respondent objected to providing claimant further treatment.

Before her September 2002 accident, claimant's job was leak survey, which involved pounding poles into the ground to check for gas leaks. But because of that accident and her resulting restrictions, respondent moved claimant to dispatch, which was much less physical. According to Dr. Eyster's August 30, 2007, medical notes, claimant had returned

² See K.S.A. 2007 Supp. 44-508(e).

to work that day but she only worked a few hours as she had problems sitting. The doctor then restricted claimant from sitting for more than 10 minutes at a time without getting up and stretching. The doctor also noted that claimant was not to work if it caused extreme pain. Claimant attempted to continue working but at some point respondent determined it did not have a job that would fit her restrictions. Consequently, claimant has not worked for respondent since sometime shortly before October 8, 2007.

Following the December 20, 2007, hearing, respondent took the deposition of Dr. Eyster. Dr. Eyster first treated claimant for her September 2002 injuries and ultimately determined she had a degenerative disk condition in her low back. Dr. Eyster has seen claimant several times following the August 2007 incident and he presently recommends she undergo an MRI. In addition to the medical purpose served by an MRI scan, that test would help determine whether claimant's present symptoms are the natural consequence of her September 2002 low back injury. The doctor testified, in part:

Q. (Mr. Gurney) Would the act of bending over to pick up something like that [keys] in a lady that has a prior diagnosis of degenerative disk disease be an aggravation, intensification, or acceleration of the prior condition most likely?

A. (Dr. Eyster) Most likely, yes, especially, as I had indicated in that letter, if it's the same disk. If it's another disk, then it's definitely -- if it's a disk that wasn't degenerated, wasn't involved in the previous study and there's a herniation of disk material, then it's a brand-new injury.

Q. Okay. And that's the whole reason for the recommendation of the MRI is to --

A. Well, that's -- that's a, from a legal perspective, a reason. The reason I want an MRI is that assuming she's still symptomatic as she was and needs further treatment, it helps guide us in terms of what that's -- from a doctor's perspective, why I want the MRI. The MRI from a legal perspective is for the reason you just expressed.

Q. And that's what is expressed in the letter I wrote to you and you signed off on, correct?

A. Correct.

Q. In stating that maybe in a different way, if -- if the MRI comes back and we're talking about the same disk space as we were previously, it's more probably true than not that this is a natural and probable progression of the prior injury, true?

A. If it comes back -- if an MRI comes back and it's a -- at the same level as the previous degenerative disk, it's a[n] aggravation in terms of a -- and it's worse, as

Mr. Karns says, but it more than likely would not have occurred with bending over but for the preexisting degenerative disk condition.³

In short, Dr. Eyster believes something anatomically occurred when claimant bent over on August 10, 2007, that caused a bulging disk to impinge further on a nerve root.

Claimant testified her present symptoms of pain radiating into her leg and numbness in her foot were present following her September 2002 low back injury. That testimony is corroborated by a February 17, 2004, medical report from Dr. C. Reiff Brown that respondent introduced at the December 2007 hearing. That report indicates that following claimant's September 2002 low back injury an October 2002 MRI scan revealed several areas of degeneration and "radial tears" at L4-5 and L5-S1 with some central disk protrusion.⁴ Moreover, the report indicates claimant experienced radiating pain into her right leg following her earlier low back injury. Dr. Brown wrote, in part:

In October he [Dr. Dobyns] recommended an MRI scan of the lumbar area as she [claimant] was continuing to have a lumbar discomfort and at that point started complaining of some radicular pain into the right leg.⁵

. . . .

The pain as it becomes more severe radiates into the sciatic distribution of the right leg and occasionally this even extends into the lateral calf and lateral side of the foot. She has intermittent numbness involving that same area associated with the radicular component.⁶

. . . .

There has been intermittently some element of a radiculopathy however this has been intermittent not confirmed electromyographically and in my opinion constitutes intermittent inflammation of the nerve root rather than frank herniation.⁷

³ Eyster Depo. at 13, 14.

⁴ P.A. and P.H. Trans., Resp. Ex. 2 at 1.

⁵ *Id.*

⁶ *Id.*, Resp. Ex. 2 at 2.

⁷ *Id.*, Resp. Ex. 2 at 4.

The present record establishes that claimant's present symptoms are similar to those she experienced following her September 2002 low back injury. And according to Dr. Eyster, if the disk level that is responsible for claimant's present symptoms was one that was injured in September 2002, he would conclude claimant's present symptoms were the natural and probable consequence of the earlier low back injury. Moreover, Dr. Eyster testified he believed the preexisting degenerative disk disease in claimant's low back placed her at risk of having additional pain from bending and that a normal disk would handle bending.

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.⁸

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.⁹

At this juncture, the Board finds and concludes it is more probably true than not that claimant's present symptoms are emanating from a disk that was injured in September 2002. Consequently, the Board affirms the Judge's decision that it is more probably true than not that claimant's present symptoms are the natural result of her September 2002 low back injury and, therefore, claimant is entitled to receive additional medical treatment. In short, the January 28, 2008, Order, should be affirmed.

WHEREFORE, the Board affirms the January 28, 2008, Preliminary Hearing Order & Post Award Medical Order entered by Judge Clark.

IT IS SO ORDERED.

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁹ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

JODIE L. BRIBIESCA

**DOCKET NOS. 1,012,597;
1,012,598; & 1,037,657**

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
 Larry G. Karns, Attorney for Respondent
 John D. Clark, Administrative Law Judge